FILE COPY

FILED
NOV 12 1948
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 358

HARRY (BUCK) OWENS, *Petitioner*

vs.

THE CURTISS CANDY COMPANY, A CORPORATION, *Respondent*

BRIEF IN OPPOSITION

IRWIN N. WALKER
EDWIN F. ZUKOWSKI
CHARLES LAMKIN, JR.
Attorneys for ~~Petitioner~~ Respondent

WALKER, ATWOOD, ZUKOWSKI & MCFARLAND
10 S. LaSalle Street
Chicago, Illinois

WARRICK, BREWER & LAMKIN
Kansas City, Missouri
Of Counsel

LINCOLN PRINTING COMPANY, CHICAGO—WA BASH 2-4004

INDEX

PAGE

Short Statement of the Matter Involved 1

Opinion of the Court below 5

Questions Presented 5

Conclusion 9

CASES CITED

Brockman Commission Co. v. *Kilbourne*, 111 Mo. App. 542 7

Continental Collieries Co., Inc. v. *Schober*, 130 Fed. (2d) 631 8

Houghtaling v. *Ball*, 19 Mo. 84 7

Illinois Fuel Co. v. *M. & O. R. R. Co.*, 319 Mo. 899 7

Johnstown v. *Downey*, 257 S. W. 504 (Mo. App.) 7

Miller v. *Wilson*, 146 Ill. 523 6

Murdock v. *Calgary Colonization Co.*, 193 Ill. App. 295 7

Oakes v. *Chicago Fire Brick Co.*, 311 Ill. App. 111 6

Standard Accident Insurance Co. v. *Roberts*, 132 Fed. (2d) 794, 796 7

STATUTES CITED

Chapter 59, Smith-Hurd Ill. Ann. Stats. Secs. 1, 3 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 358

HARRY (BUCK) OWENS, *Petitioner*

vs.

THE CURTISS CANDY COMPANY, A CORPORATION, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent respectfully submits that the petition for writ of certiorari should in the exercise of sound judicial discretion be denied. In support of its position, Respondent states as follows:

A.

SHORT STATEMENT OF THE MATTER INVOLVED

In the belief that the statement of petitioner does not adequately and concisely present to this Court the facts and issues involved in this cause, we submit our statement of the issues.

The action below involves a suit for damages for breach of an alleged contract for the performance of services as

a radio entertainer for a term of two years. (R. 10-13). The action was originally brought in the State Court of Missouri and was removed to the District Court at Respondent's instance on the ground of diversity of citizenship. Prior to the trial of the cause, Respondent submitted its motion for summary judgment on the ground that no material question of fact was controverted. It was argued that as a matter of law, based upon the facts, the Respondent was entitled to judgment. The specific ground urged was that under the Statute of Frauds of either Missouri or of Illinois, whichever was applicable[1] the alleged contract was unenforceable for lack of a legally sufficient memorandum in writing. This issue was likewise raised by the pleadings and by motion made at trial for a directed verdict, which was denied. The Petitioner filed a cross-motion for summary judgment upon the basis of admissions alleged to have been made by the Respondent and claimed to furnish a basis for a judgment for the Petitioner. The trial court denied both motions on the ground that there appeared to be a controverted question of fact of substantial importance to the disposition of the cause (R. 432) which should be heard upon a trial of the cause.

Thereafter the cause went to trial before a jury upon the issues of the existence of the contract, and the defenses of mutual rescission of the contract, abandonment, and waiver.

The jury found for the Respondent on these issues of fact and a judgment was entered accordingly.

The Petitioner thereupon appealed to the Court of Appeals for the Eighth Circuit. The points relied upon

---

(1) Petitioner in his briefs before the Court of Appeals, as well as in his present petition for writ of certiorari apparently concedes that the contract is an Illinois contract and that the Illinois Statute of Frauds is applicable.

for reversal of the judgment of the Court in substance raised issues of the correctness of the charge to the jury upon the issues of rescission, abandonment and waiver. It was also urged that the verdict of the jury was without support in the evidence. (Opinion of Circuit Court R. 461).

Upon Petitioner's theory of the case as presented to the Court of Appeals, no issue was presented which was not fundamentally that of the correctness of the instructions of the trial court upon the issues of the binding effect of certain representations made, of the definition of the law as applied to rescission, abandonment and waiver, and the propriety of the findings of the jury upon specific questions of fact as controlled by issues of law on which there was no basic controversy.

Respondent herein urged in support of the judgment of the District Court that the verdict of the jury was supported by evidence and that no error was committed in the instructions by the trial court.

Respondent also urged the further basis of affirmance, not referred to by Petitioner, that as a matter of law under the pleadings and motions, it was entitled to the judgment actually entered on the ground that the applicable Statute of Frauds had not been satisfied by the requisite memorandum in writing. On this theory, the judgment was correct, entirely apart from any issue arising on the trial of the cause, such as instructions, rulings at the trial and the existence of substantial evidence upon which the verdict was based.

In reply Petitioner argued only that the issue of law so presented by Respondent could not be considered by the Court of Appeals for the reason that no cross-appeal had

been filed, with a brief statement that at any rate the applicable Statute of Frauds was satisfied by the evidence in the record.

The Court of Appeals affirmed upon the ground that there was no error in the instructions upon the issues of rescission, abandonment and waiver, and that the verdict of the jury was supported by the evidence. Its rulings upon these issues are entirely sufficient to support its affirmance of the decision of the District Court.

It further found, as an additional ground, that as a matter of law Respondent was entitled to judgment for the reason that the Statute of Frauds of both Missouri and of Illinois, (both being substantially identical in all material respects) whichever was applicable, had not been satisfied by the requisite memorandum in writing. No issue of conflict of laws was argued upon the appeal, nor, as is apparent from both opinions below, does either decision turn upon considerations involving the determination of the jurisdiction whose law governs the rights of the parties.

It is the Respondent's contention that no issue is presented by the record in this proceeding which is of significance or of public importance. The cause was tried before a jury upon issues of fact and the decision is controlled in substance by the facts. The Court of Appeals found that no error was committed in the instructions and that the verdict was supported by the evidence.

No point was raised by Petitioner in his brief before the Court of Appeals which raises any problem of importance. No issue involving a choice of law was urged upon by the appeal, and the decision is in accordance with the applicable decisions of the State Courts on all questions of State law.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 169 Fed. (2d) 179, and at pages 459 to 472, inclusive, of the record.

B.

THE QUESTIONS PRESENTED

We feel that the enumeration of questions presented (Petition page 9) leaves somewhat uncertain the nature of the propositions urged by Petitioner.

However, we shall consider here briefly these questions:

(1) The eight questions herein discussed by Petitioner
(2) all seem to bear upon the basic issue sought to be
(3) raised, and will be discussed as a unit.

(4) As nearly as we can arrive at the significance of
(5) these questions, it would appear to be the Petitioner's
(6) point that the contract involved was an Illinois con-
(7) tract and as such controlled by the Illinois Statute
(8) of Frauds. He claims that under the decisions of the Courts of Illinois such Statute is procedural in nature and not substantive; that it is merely a rule of evidence.

He then argued that under the State law of Missouri (which would be controlling upon the Federal District Court here) the Illinois Statute of Frauds would have no force, since it is merely procedural in nature; that the oral contract should be enforced in Missouri on the theory that the Illinois Statute of Frauds does not apply because it is procedural and Missouri Statute of Frauds would not apply because the contract was an Illinois contract.

We believe that the contention is without merit and in direct conflict with the clear weight of authority of the decisions of both Illinois and of Missouri.

Specifically, Respondent urges as follows in answer to these questions:

(a) None of the questions herein presented were raised in the Court of Appeals by Petitioner. An examination of his brief specifying the points relied upon for reversal of the judgment discloses that there was not the slightest reference to any question involving the Statute of Frauds. There was no occasion for such issue to be raised, since the ruling of the Court below had been in favor of the Petitioner on this issue.

Respondent in its answer urged the argument of the applicability of the Statute of Frauds as a further ground for the affirmance of the judgment in its favor. Petitioner's sole response to that issue was that in default of the proper cross-appeal the question could not be considered. The questions herein sought to be raised with reference to this issue of law are an afterthought and were not relevant or necessary to the decision in the Court below.

(b) The propositions of law urged by Petitioner are entirely erroneous.

The contract in question is conceded to be an Illinois contract. The Statute of Frauds of the State of Illinois (Ch. 59, Smith-Hurd Ill. Ann. Stat., Sec. 1, 3), has by the unanimous weight of opinion of the decisions of the Illinois courts been held to be substantive in character and not merely procedural. *Miller* v. *Wilson,* 146 Ill. 523; *Oakes* v. *Chicago Fire Brick Co.,* 311 Ill. App. 111.

In the latter case the Court at page 114 states:

"The leading case on the question in this State, *Miller* v. *Wilson,* 146 Ill. 523, enumerates

the doctrine that the Illinois Statute of Frauds is substantive in nature and not remedial."

Also in point is *Murdock* v. *Calgary Colonization Co.*, 193 Ill. App. 295, in which the Court said:

"But whatever may be the law in other States, it is clearly the settled law in this State that the subject matter of a Statute of Frauds comes within the *lex loci contractus* and therefore does not merely pertain to the remedy but affects the legal obligation and the validity of contracts."

It is likewise the settled law of the State of Missouri that the Courts of that State will apply to a contract made in Illinois the substantive law of contract of the State of Illinois. Under this rule, the Missouri courts will follow the Illinois Statute of Frauds as a substantive incident of the validity of the contract. *Houghtaling* v. *Ball*, 19 Mo. 84; *Johnstown* v. *Downey*, 257 S. W. 504, (Mo. App.); *Brockman Commission Co.* v. *Kilbourne*, 111 Mo. App. 542; *Illinois Fuel Co.* v. *M. & O. R. R. Co.*, 319 Mo. 899.

(c) The decision of the court below on the issue of the Statute of Frauds is in accord with the settled law of Missouri. There is no conflict between the decision of the Federal court below and the law as interpreted by the Missouri State courts.

(9) This involves an issue of fact, raising no question of importance.

(10) This raises a question of procedure and practice of the Federal Courts and the decision of the Court of Appeals is in accord with the decision of that Circuit and of the Federal courts generally. *Standard Accident Insurance Co.* v. *Roberts*, 132 Fed. (2d) 794, 796.

These questions all involve issues of fact decided in accordance with settled law and not submitted to the lower court as the basis of appeal. No issue of importance is raised.

This point has obviously no merit.

These questions involve issues of facts, controlled by the facts and involving no question of law of importance.

It is obvious from the mere statement of the question by Petitioner that no conflict of decisions between Circuits is presented by the authorities cited. The decision in *Continental Collieries Co., Inc.* v. *Schober*, 130 Fed. (2d) 631, has no relevancy to any issue in this case.

C.

CONCLUSION

The decision of the Court below is correct. The case presents no conflict between Circuits, or between the State and Federal Courts in their interpretation of the local law applicable. The case depends almost exclusively upon its facts. The only issue of law raised by the present petition is on a point unnecessary to the affirmance of the decisions of the trial court, and of the Court of Appeals. No question of importance is raised and the Petitioner has had full hearing on all issues of fact and of law which govern his rights.

DATED: November 8, 1948, at Chicago, Illinois.

THE CURTISS CANDY COMPANY
Respondent

By IRWIN N. WALKER and
EDWIN F. ZUKOWSKI
CHARLES LAMKIN, JR.
Attorneys for Petitioner

WALKER, ATWOOD, ZUKOWSKI & MCFARLAND
10 S. LaSalle Street, Chicago, Illinois

WARRICK, BREWER & LAMKIN
Kansas City, Missouri
Of Counsel